tioner's summons-in-chambers to amend his petition. The learned judge was also correct to rule that the senior assistant registrar had jurisdiction to hear the petitioner's application for amendment of his petition. But we regret that we were unable to agree with the learned judge when he held further that the respondent would be prejudiced by the amendment of the petition in this case. Even after amendment of the petition, the petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court would exercise its powers under s 48 of the Act to grant any relief to the parties. For the reasons stated above, we therefore allowed the appeal with costs, set aside the order of the learned judge and restored the order of the senior assistant registrar in allowing the said amendment to the petition.

Appeal allowed.

Solicitors: *Ho Thian Cheh & Co; Arthur Lee, Yap & Netto.*

Reported by *Prof Ahmad Ibrahim*

Taman Zahari Zabidi Sdn Bhd v Adnan Sundra & Low & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 533 OF 1988
ABDUL HAMID LP, MOHAMED YUSOFF AND AJAIB SINGH SCJJ
15 JANUARY 1990

Legal Profession — Disbursement — Claim for disbursement by firm of solicitors made on behalf of clients in a land transaction — Defence that solicitors had acted against interest of client — Retainer of solicitor — No rule prohibiting solicitor from acting as common solicitors for purchaser and bank financing the purchase — Whether solicitors had acted in breach of duty to client

In this case, the appellant had retained the first respondent ('the respondent') to negotiate the purchase of lands at Telok Intan, Perak. The purchase of the land was financed by Bank Bumiputra Malaysia Bhd by a bridging finance of $20,000,000. The bank retained the respondent to prepare the necessary documents for the loan. In pursuance of the loan, the bank issued a letter of undertaking in favour of the vendor. The appellant subsequently sent a cheque for $210,000 to the vendor's solicitors for registration fees on the transfer of the lands to it and it also requested the bank to pay a sum of $126,207 to the respondent as registration fee to charge the lands as security for its loan with the bank. The lands were transferred to the appellant and building plans in respect of the development of the houses on the lands were approved by the relevant authorities. The vendor's solicitors demanded for the release of the balance of the purchase price for the land. At this stage, the appellant changed its mind and decided not to proceed with the purchase. In order to abort the purchase, the appellant sent a letter to the bank to countermand its instructions to pay the registration fees for the charges. No copy of this letter was sent to the respondent. The vendor's solicitors offered a loan to the respondent for the sum required for the registration fees and the respondent secured the loan from the vendor's solicitors, registered the charges and instructed the bank to release the balance of the purchase price amounting to $17m to the vendor. The respondent brought an action to claim disbursement of the sum of $126,200 which they had made on behalf of the appellant. The appellant refused to pay, contending that the respondent had acted against its interests. The learned judge found that the appellant's contention was baseless and awarded judgment for the respondent. The appellant appealed.

Held, dismissing the appeal:
On the facts of this case, the respondent had not at any time acted in contravention of any instruction from the appellant. All along, the respondent was acting in accordance with the instructions of the appellant regardless of the fact that the sum required for the stamp duty had not been paid by the bank but advanced by the solicitors for the vendors.

[Di dalam kes ini, pihak perayu telah mendapatkan perkhidmatan pihak responden untuk merundingkan perkara pembelian tanah di Telok Intan, Perak. Pembelian itu dibiayai dengan pinjaman $20,000,000 daripada Bank Bumiputra Malaysia Bhd. Bank itu telah mendapatkan perkhidmatan pihak responden untuk menyediakan dokumen-dokumen untuk pinjaman itu. Mengikut pinjaman itu, bank itu telah mengeluarkan satu surat akujanji kepada pihak yang menjual tanah itu. Pihak perayu kemudiannya telah mengirimkan cek bernilai $210,000 kepada peguam pihak penjual untuk bayaran pendaftaran bagi pemindahan tanah tersebut kepada mereka. Pihak perayu juga telah meminta bank itu membayar sejumlah $126,207 kepada pihak responden untuk bayaran pendaftaran mencagarkan tanah tersebut kepada bank itu sebagai cagaran bagi pinjaman itu. Tanah itu telah dipindahmilik kepada pihak perayu dan pelan-pelan untuk membina rumah-rumah di atas tanah itu telah diluluskan oleh pihak berkuasa yang berkenaan. Peguam pihak penjual seterusnya meminta pembayaran baki wang untuk pembelian tanah itu. Pada ketika itu, pihak perayu telah menukar fikiran dan membuat keputusan menghentikan pembelian itu. Untuk menggugurkan pembelian itu, pihak perayu telah menghantar surat kepada bank itu untuk membatalkan arahan mereka supaya bank itu membayar bayaran pendaftaran cagaran. Salinan surat itu tidak dihantar kepada pihak responden. Peguam pihak penjual telah menawarkan pinjaman kepada pihak responden bagi jumlah yang diperlukan untuk bayaran pendaftaran tersebut. Pihak responden telah mengambil pinjaman itu dan mendaftarkan cagaran itu. Mereka kemudiannya mengarahkan bank itu supaya membayar baki harga pembelian tanah itu sejumlah $17m kepada pihak penjual. Pihak responden seterusnya mengambil tindakan menuntut perbelanjaan sebanyak $126,200 yang telah dibuat oleh mereka bagi pihak perayu. Pihak perayu enggan membayar dan mengatakan bahawa pihak responden telah bertindak menentang kepentingan mereka. Hakim yang arif berpendapat bahawa hujah pihak perayu tidak berasas dan seterusnya memberi penghakiman kepada pihak responden. Pihak perayu telah membuat rayuan.

Diputuskan, menolak rayuan pihak perayu:
Mengikut fakta-fakta kes ini, pihak responden tidak sekalipun bertindak melanggar arahan pihak perayu. Tidak kira yang cukai

setem bagi cagaran itu tidak dibayar oleh bank itu tetapi telah didahulukan oleh peguam pihak penjual, mahkamah berpendapat bahawa pihak responden telah bertindak menurut arahan pihak perayu.]

Cases referred to

1 *Moody* v *Cox & Hatt* [1917] 2 Ch 71 (refd)
2 *Smith* v *Mansi* [1962] 3 All ER 857 (refd)

Appeal from: Civil Suit No C457 of 1983 (High Court, Kuala Lumpur)

MS Murthi (*Paul Ong* with him) for the appellant.
Porres P Royah for the first respondent.
Vijay Kumar for the second respondent.

Cur Adv Vult

Abdul Hamid LP (delivering the judgment of the court): This appeal involves a claim by the first respondent, a firm of solicitors, for a sum of $126,200 as disbursement made on behalf of the appellant in a land transaction. The appellant refused to pay, contending that the first respondent had acted against its interest. The learned judge found that the appellant's contention was baseless and awarded judgment against the appellant; hence the appeal.

The appeal against the second respondent, Bank Bumiputra Malaysia Bhd, was abandoned and consequently dismissed with costs. The remaining appeal against the first respondent (now known simply as 'respondent'), concerns their obligations as common solicitors to the appellant and Bank Bumiputra Malaysia Bhd.

In 1982, the appellant retained the respondent to negotiate the purchase of the lands at Telok Intan, Perak, for housing development. The vendor for the land was Mah Poh Cheong Co Sdn Bhd. There was no written retainer of the respondent by the appellant but a retainer will be presumed if the conduct of the parties shows that the retainer of solicitor and client has in fact been established between them (*Corderey on Solicitors* (7th Ed) at p 578). There is, however, no dispute that the respondent was retained by the appellant for this transaction.

On 21 May 1982, two agreements were prepared by the respondent in respect of this purchase and both the agreements were executed by the appellant and the vendor.

The purchase of the land was financed by Bank Bumiputra Malaysia Bhd, Kuala Lumpur, by a bridging finance of $20,000,000, approved to the appellant on 31 May 1982. Subsequently, on 10 June 1982, Bank Bumiputra Malaysia Bhd retained the respondent to prepare the necessary documents for the loan.

There is no general rule prohibiting the respondent from acting as common solicitors to both the appellant and the bank but in such a situation, they must act at their own risk. (See *Moody* v *Cox & Hatt*[1] and *Smith* v *Mansi*.[2])

On 25 October 1982, in pursuance of the loan, the bank issued a letter of undertaking in favour of the vendor in these terms:

> Bank Bumiputra Malaysia Berhad
> (Incorporated in Malaysia — Head Office — Kuala Lumpur)
>
> Private and Confidential
>
> M/s Mah & Partners
> Suite 4.70-4, 4 Floor
> Wisma Central, Jalan Ampang
> Kuala Lumpur
>
> Dear Sir
>
> Re: Letter of undertaking — Agreement dated 21 May 1982 made between Mah Poh Cheong Co Sdn Bhd and Zahari Construction Sdn Bhd for the sale of the lands described therein for a total consideration of $19,000,000.
>
> In consideration of your clients, Mah Poh Cheong Co Sdn Bhd agreeing at our request and the request of Zahari Construction Sdn Bhd and Taman Zahari Zabidi Sdn Bhd to transfer all the lands purchased under the above-mentioned agreement to Taman Zahari Zabidi Sdn Bhd, we, Bank Bumiputra Malaysia Bhd do hereby undertake to pay to you the whole of the balance sum of $17.1m by way of our cheque made out in favour of Mah Poh Cheong Co Sdn Bhd upon our receipt of confirmation from our solicitors, Messrs Adnan Sundra & Low, that all the said lands have in fact been registered in the name of Taman Zahari Zabidi Sdn Bhd or that the building plans for the first phase of 92 units of double-storey terrace houses have been approved by the relevant authorities (whichever shall be the later).
>
> Yours faithfully
> for Bank Bumiputra Malaysia Bhd
> Domestic Banking Division
> Head Office
>
> Sgd
> (Abdul Aziz Haji Othman)
> General Manager
>
> cc Taman Zahari Zabidi Sdn Bhd
> M/s Adnan Sundra & Low

On 2 December 1982, the appellant sent a cheque for $210,000 to the vendor's solicitors for registration fees on the transfer of the lands to it and on the same day it also requested the bank to pay a sum of $126,207 to the respondent as registration fee to charge the lands as security for its loan with the bank.

By 27 December 1982, the lands consisting of 655 titles were transferred to the appellant and earlier, on 22 November 1982, building plans in respect of the development of houses on the lands were approved by the relevant authorities, Majlis Daerah Hilir Perak, Telok Intan. The conditions in the undertaking by the bank having purportedly been fulfilled, the vendor's solicitors demanded for the release of the balance of purchase price for the land.

Meanwhile the appellant changed its mind not to proceed with the purchase of the land. Their reason being that firstly, the building plans approved by the authorities did not include reinforced concrete plans and thus it could not proceed with the building project. Its other reason was that there was no water supply for the project until 1985. This was one of the conditions imposed in the building plans approved by the Majlis Daerah. In order to abort the purchase, the appellant, by letter dated 13 December 1982, countermanded its instructions to the bank to pay the registration fees for the charges.

It is in evidence that the vendor's solicitors offered a loan to the respondent for the sum required for the registration fee and it is not disputed that the respondent secured the loan from the vendor's solicitors, registered the charges and instructed the bank to release the balance of the purchase price amounting to $17m to the vendor. On 30 December 1982, the bank released the money to the vendor.

This appeal however is confined only to one issue, namely, whether the solicitors can act contrary to client's instructions. Mr Murthi, on behalf of the appellant, said that a solicitor's duty is to protect the interest of his client and to carry out his instructions in matters to which the retainer refers. He further submitted that the respondent was in breach of its duty to the appellant when acting in contravention of the express instructions of the appellant. That by so acting, the respondent committed the appellant to greater liability than it chose to take. In that event the appellant was justified in repudiating liability for the $126,207 and counterclaim against the respondent.

Mr Royan, on behalf of the first respondent, submitted that the learned judge did not find the respondent in breach of its retainer as solicitor to the appellant. He maintained that the learned judge is correct to find that the respondent was not acting wrongly in advising the bank to release $17,000,000 loan to the vendor in compliance with the letter of undertaking.

In deciding the only issue canvassed before us in this appeal, it is necessary to highlight some of the salient facts in order that the matter may be viewed in its proper perspective. It is to be observed that on 29 November 1982, Mah & Partners wrote to the respondents, informing them that stamp duty payable on the transfer amounted to two hundred and ten thousand ringgit ($210,000). This letter was copied to the appellant (AC 83 p 261 appeal record).

On 1 December 1982, the respondent wrote to the appellant drawing the appellant's attention to the letter from Mah & Partners and asked the appellant to pay a further sum of $214,368 (two hundred and fourteen thousand three hundred and sixty eight ringgit), the sum required for registration of the transfer and the charge. The said sum included the sum of $100,007 (one hundred thousand and seven ringgit) as stamp duty payable on the charge (AC 86 p 264 appeal record).

It will be noticed that on 2 December 1982, the appellant wrote to the respondent informing the respondent that they made the payment of a sum of $210,000 (two hundred and ten thousand ringgit) as stamp duty for the transfer direct to Mah & Partners (AC 87 p 265 appeal record). In that letter, reference was made to the respondent's letter of 1 December 1982 but no mention whatsoever was made to the respondent's request for a sum of $214,368 (two hundred and fourteen thousand and three hundred and sixty eight ringgit) and facts reveal that the appellant in fact paid the stamp duty for transfer of $210,000 (two hundred and ten thousand ringgit) to Mah & Partners on 30 November 1982 as Mah & Partners' receipt shows (AC 84 p 262 appeal record).

Also on 2 December 1982, the appellant wrote to the bank asking the bank to pay a sum of $126,000 (one hundred and twenty six thousand ringgit) inclusive of a sum of $107,000 (one hundred and seven thousand ringgit) for stamp duty for the charge to the respondent. For some reason unexplained, this letter was not copied to the respondent nor was mention given of it in the appellant's letter of 2 December 1982 to the respondent.

Now on 8 December 1982, the respondent paid the stamp duty of $100,007 (one hundred thousand and seven ringgit) (AC 89 p 267 appeal record). The sum was advanced by Mah & Partners. It was only on 13 December 1982 that the appellant wrote to the bank countermanding the earlier instruction of 2 December 1982. What is of importance to note is that no copy of this letter was extended to the respondent.

Viewed in the light of these facts, it is clear that all along the respondent was acting in accordance with the instruction of the appellant regardless of the fact that the sum required for the stamp duty for the transfer had not been paid by the bank but advanced by Mah & Partners. It would have been otherwise, or in other words, the respondent may be said to have acted in contravention of the appellant's instruction if the appellant had given notice to the respondent of their letter of 13 December 1982 to the bank countermanding the instruction given on 2 December 1982. There was nothing of that sort here.

The appellant's letter to the bank dated 2 December 1982 was not copied to the respondent. Nor was the respondent informed by the bank of the appellant's letter countermanding the earlier instruction. It is evident that the respondent had no knowledge whatsoever of the appellant's countermanding instruction. For these reasons, we have no reason to hold that the respondent had any

time acted in contravention of any instruction from the appellant. It is therefore our view that the appellant's allegation as contained in para 16 of the amended defence and counterclaim had not at all been substantiated.

Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Paul Ong & Associates; Adnan, Sundra & Low; Albar Zulkifly & Yap.*

Reported by *Prof Ahmad Ibrahim*

Co-operative Central Bank Ltd v Sri Devi

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 100 OF 1988
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND AJAIB SINGH SCJJ
30 DECEMBER 1989

Land Law — Charge — Chargor a co-operative society — Charge executed to secure loan given by society to husband of chargee — Husband member of society — Power of sale of co-operative society in the event of chargee's default — Defence that chargee not liable until dispute has been determined by competent court under s 49 of Co-operative Societies Act 1948 — National Land Code 1965, s 254 — Co-operative Societies Act 1948, s 49

Banking — Security — Loan granted by co-operative society to a member — Wife of member charging land as security for loan — Default in payment of loan — Liability under the charge — Co-operative Societies Act 1948, s 49 — National Land Code 1965, s 254

Words and Phrases — 'Dispute' — Co-operative Societies Act 1948, s 49

In this case, the appellant, a co-operative society, had granted a loan of $100,000 to a member of the society. In order to secure the loan, the respondent, the wife of the member, charged a piece of land of which she was the registered proprietor in favour of the appellant. Under the charge, the respondent agreed to pay the appellant on demand the total amount outstanding on the said loan together with interest. The respondent defaulted in the repayment of the loan and the appellant took steps to have the land sold by public auction to recover the loan. At the trial, counsel for the respondent submitted that the respondent was not liable until the breach by the member of the co-operative society had been determined by a competent court. Reference was made to s 49 of the Co-operative Societies Act 1948. The learned trial judge dismissed the application of the appellant and the appellant appealed.

Held, allowing the appeal:

(1) Section 49 of the Co-operative Societies Act 1948 has no application in this case as the respondent is not a member of the co-operative society and the transaction between the appellant and the respondent does not create a dispute which only involved the society and a member.

(2) The matter of the charge is one under the National Land Code 1965. It creates a right on the part of the chargee in the event of default to pay to exercise the power of sale. The court has the power to make the order for sale.

(3) This is not a dispute between the appellant and any of its members. The fact that the appellant is a co-operative society does not automatically make the litigation a dispute within the meaning of s 49 of the Co-operative Societies Act 1948.

[Didalam kes ini, pihak perayu, sebuah pertubuhan koperasi, telah memberikan pinjaman sebanyak $100,000 kepada seorang ahlinya. Untuk menjamin pinjaman itu, pihak responden, isteri ahli itu, telah mencagar sebidang tanah kepunyaannya kepada pihak perayu. Mengikut cagaran itu, pihak responden bersetuju membayar kepada pihak perayu segala jumlah yang masih terhutang bersama bunga bila perayu membuat tuntutan. Responden telah ingkar membayar balik pinjaman itu dan perayu telah mengambil tindakan supaya tanah itu dijual melalui lelong awam untuk mendapat kembali wang pinjaman itu. Di perbicaraan, peguambela pihak responden telah menghujah bahawa responden tidak bertanggungjawab sehingga perkara keingkaran ahli itu telah diputuskan oleh mahkamah. Peguambela telah merujuk kepada s 49 Akta Pertubuhan Koperatif 1948. Hakim yang arif telah menolak permohonan perayu dan beliau telah membuat rayuan.

Diputuskan, membenarkan rayuan pihak perayu:

(1) Seksyen 49 Akta Pertubuhan Koperatif 1948 tidak berkenaan dengan kes ini kerana responden bukan seorang ahli pertubuhan koperatif itu dan urusan antara perayu dan responden itu tidak membangkitkan perselisihan yang cuma melibatkan sebuah pertubuhan dan seorang ahli.

(2) Perkara cagaran itu terlibat di bawah Kanun Tanah Negara 1965. Ia membentuk hak pemegang cagaran menggunakan kuasa penjualan jika berlakunya keingkaran. Mahkamah mempunyai kuasa membuat perintah penjualan.

(3) Ini bukan satu perselisihan antara perayu dan seseorang ahlinya. Fakta bahawa perayu ialah sebuah pertubuhan koperatif tidak secara automatik membawa dakwaan itu sebagai satu perselisihan di bawah makna s 49 Akta Pertubuhan Koperatif 1948.]

Cases referred to

1 *Bede Steam Shipping Co Ltd* v *Bunge Y Born* (1927) 27 Lloyd's Rep 410 (refd)
2 *Professor Dr A Kahar Bador & Ors* v *N Krishnan & Ors* (No 2) [1983] 1 MLJ 412 (refd)
3 *Subramaniam* v *Tan Lee Leng & Ors* [1980] 1 MLJ 171 (refd)
4 *M Arulandan* v *Malaysian Co-operative Insurance Society Ltd* [1987] 1 MLJ 485 (refd)
5 *Deccan Merchants Co-operative Bank Ltd* v *Dalichand Jugray Jain & Ors* AIR 1969 SC 1320 (refd)

Legislation referred to

Co-operative Societies Act 1948 s 49
National Land Code 1965 ss 254, 256, 257

CV Das (*John Mathew* with him) for the appellants.
PM Mahalingam for the respondent.

Cur Adv Vult